

Professor Nicholson

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duties are not being performed, it exists perpetually as long as police duties are being performed. The public has no less interest in sharing and discussing government action on private property than on public property.

The protest at Wild Animal Safari utilized private land as a public forum, and was meant to be seen and heard. The setting of *Fordyce* was a protest that took place on public property. Whitten filmed police interactions like the plaintiff in *Fordyce*. There is no practical reason to separate these two cases besides the simple labels of “public” and “private” property. Functionally, Wild Animal Safari’s private property acted in the same way as the public property in *Fordyce*. Just as a police officer would not expect his actions to be private in the protest in *Fordyce*, he could not reasonably expect his actions to be private at the Wild Animal Safari protest. Therefore, police expectation of privacy remains unchanged.

One’s right to record police performing their duties in public areas is not contingent on whether a location is public or private, but the function of this location. Police officers performing their duties still have trust placed in them, no matter what sort of property they are on. Therefore, the individual right to record police officers performing their duties should extend to private property that acts as a public space.

3. The right to record should not be limited to third-parties.

In *Glik*, in addition to affirming a general right to record police officers performing their duties in public spaces, the court mentioned that this right is subject to “reasonable time, place, and manner restrictions.” *Glik*, 655 F.3d at 84.

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The *Glik* court stated that the individual recorded police officers “from a comfortable remove” and didn’t “molest them in any way,” so his actions satisfied this requirement. *Id.* This standard is shared by *Smith*. *Smith*, 212 F.3d at 1333.

These cases raise potential questions regarding who might be able to record police interactions because they involve third parties filming an arrest, not the actual person being arrested.

The reasonable time, place, and manner restrictions mentioned in *Glik* and *Smith* indicate that the right to record is also limited in scope to non-intrusive recordings. This is the source of the line “from a comfortable remove” in *Glik*. The purpose of this was not to say police interactions can only be filmed from a “comfortable remove,” but that the individual in *Glik* could not have overstepped his constitutional right to record. The ways a person can interfere with an arrest are tremendously limited when that person films from a distance. Filming up-close as a third party presents at least a physical obstacle for police duties. However, this is irrelevant in Whitten’s case. Whitten is filming as she is getting arrested. Because the officers did not realize she was recording until she was being searched, Whitten’s recording clearly did not interfere with the arrest in any significant way.

The First Amendment right made out in *Glik* and *Smith* was never meant to be exclusively enjoyed by a third-party. Non-intrusiveness, not distance, is the qualifier in these cases, and Whitten falls into this category. A person being arrested has just as much of a right to film police officers performing their duties in

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public spaces as anyone else, contingent only upon the time, place, and manner in which the filming is conducted.

CONCLUSION

This Court should reverse the Garner Supreme Court’s decision and remand the case for further proceedings. The Garner statute’s goal of individual privacy cannot be justified without reference to the category of content it bans. Therefore, it must survive strict scrutiny.

Even if this argument is not accepted, the Garner statute violates Whitten’s First Amendment rights and survives neither strict nor intermediate scrutiny. There is a clear pattern in numerous circuits that shows a constitutional right to record police officers performing their duties in public places. Whitten recorded police officers in a reasonable manner, place, and time. This Court should affirm the right established in the First Circuit to preserve free discussion of government affairs.

Respectfully submitted,

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CERTIFICATIONS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief for Petitioner was served on all parties on March 14, 2022, by depositing the briefs in the U.S. Mail, postage prepaid or by personal delivery.

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4993 words, including every page except appendices.

Respectfully submitted,

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